

Curious Lawyer
Social Media Law: Twitter,
YouTube, Instagram & More

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Scope of issues

- Social Media online platforms liability for copyright and defamation.
 - YouTube, Yelp, Twitter, Instagram, LiveJournal, and more.
- Online companies trafficking in information about persons/businesses
 - Information can be third party informational commentary or others' actual content.
- Online service providers (OSP) broad immunities based upon congressional actions in the early internet years.
- Liability for informational postings: tort liability for defamation (the Yelp world).
- Liability and remedial scheme for copyright infringement (the YouTube world).
- Reforms to immunity afoot? SCOTUS changes to immunity scope?

Tort Principles Go Online

- History that led to the federal immunity starts with common law tort case law in the early internet years...*Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).
- Plaintiffs sued Prodigy for defamatory comments made by an unidentified party on one of Prodigy's bulletin boards.
- Held: Prodigy to the strict liability standard normally applied to original publishers of defamatory statements, rejecting Prodigy's claims that it should be held only to the lower "knowledge" standard usually reserved for distributors. The court reasoned that Prodigy acted more like an original publisher than a distributor both because it advertised its practice of controlling content on its service and because it actively screened and edited messages posted on bulletin boards.
- Congress thus enacted § 230 to undo *Stratton's* reasoning.

Communications Decency Act of 1996, 47 U.S.C.

§ 230(c) immunity

"No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

"**interactive computer service**" is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." = OSP

Section 230 Immunity Twin Goals

- Congress wanted to encourage the unfettered and unregulated development of free speech on the Internet, and to encourage e-commerce activities online.
- Congress sought to “encourage interactive computer services and users of such services to self-police the Internet for obscenity and other offensive material.”

Zeran v. AOL, 129 F.3d 427 (4th Cir. 1997)

- One of first cases to interpret 230
- Facts: false advertisement placed on an AOL bulletin board, which directed users to call plaintiff and which resulted in him facing significant harassment.
- “Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech...Congress made a policy choice ... not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages ...”
- Held: immunity for AOL.

issues and section 230 results

Yes 230 immunity	No 230 immunity
<p>Negligence claim failed against MySpace for failing to implement safety measures that would prevent minors from lying about their age. <i>Doe v. Myspace</i>, 528 F.3d 413 (5th Cir. 2008)</p>	<p>A user of Yahoo's online dating services sued after he discovered that Yahoo made false profiles and sent users now-defunct profiles to entice them to re-subscribe. <i>Anthony</i>, 421 F. Supp. 2d 1257 (N.D. Cal. 2006)</p>
<p>The defendant, who ran an online discussion group around women's health, posted some third-party content that attacked the plaintiffs, two doctors critical of alternative medicines. Immunity because defendant did not create content. <i>Barret v. Rosenthal</i>, 146 P.3d 510 (Cal. S. Ct. 2006)</p>	<p>Yahoo! failed to take down a false profile of the plaintiff even after an employee assured her that it would be removed. No immunity as to promissory estoppel claim. <i>Barnes v. Yahoo!</i>, 570 F.3d 1096 (9th Cir. 2009).</p>
<p>Sheriff sued Craigslist arguing that the site's "adult" services section facilitated prostitution/created a public nuisance. <i>Dart v. Craigslist</i>, 665 F. Supp. 2d 961 (ND Ill 2009)..</p>	<p>Mindspring hosted a website that infringed Gucci's trademark, notified multiple times that the site was infringing but never took any action. 230 does not expand or limit existing IP laws. <i>Gucci v. Hall</i>, 135 F. Supp. 2d 409 (SDNY 2001)</p>

The case of Yelp, the California supreme court, and angry lawyers

- The issue: Your client (or you!) is angered by a defamatory yelp post from a yelp user...what to do to get it down?
- Sue of course...the facts of *Hassell v. Bird*, Cal S Ct., July 2018:
 - Client bird hires lawyer Hassell in pi case, client becomes unhappy,
 - Yelp postings appear, apparently from client:
 - “STEER CLEAR OF THIS LAW FIRM! and research around to find a law firm with a proven track record of success, a good work ethic, competence and long-term client satisfaction. there are many in the bay area and with some diligent smart interviewing, you can find a competent attorney, but this won’t be one of them.”
 - Lawsuit filed for defamation against client in sf superior court
 - Default judgment with order to nonparty yelp to remove defamatory post

Yelp's response

- Judgment makes it way to yelp.
- Yelp's motion principally argued that the order was barred by Section 230.
- Court: denied.
- Court of appeals: affirmed
- So yelp goes to Cal S Ct....grant review

California Supreme Court's decision

- “Once CDA immunity applies, providers are immune from ‘any’ claim arising out of content originating from a third party, regardless of the theory underlying the cause of action.”
- Can’t use creative back door lit strategies to get what 230 would prohibit directly: “Yelp could have promptly sought and received section 230 immunity had plaintiffs originally named it as a defendant in this case” and that immunity “would have shielded Yelp from the injunctive relief that plaintiffs seek.”
- By enjoining yelp to act, “Yelp is inherently being treated as the publisher of the challenged reviews, and it has not engaged in conduct that would take it outside section 230’s purview in connection with the removal order.”
- Judgment as to yelp vacated.

Congressional action?

- In 2018, the 230 immunity was amended to require OSP's to take affirmative steps if sex trafficking content is on their services otherwise there is no immunity and state tort or even criminal theories attach. But that narrow amendment expressly did not touch the rest of the broad 230 immunity.

- But many in congress are questioning the breadth of immunity given 2016 election issues:

“You’ve created these platforms. And now they’re being misused...And you have to be the ones to do something about it. Or we will.” Senator Dianne Feinstein to Facebook/Google/Twitter gc’s, 2018

- And the supreme court has likened the services to traditional public squares that are subject to first amendment regulations.

Youtube: copyright infringement principles in the online world

- Digital millennium copyright act (dmca) enacted in 1998 to address online infringement for OSP's.
- Copyright liability as strict liability tort technically triggers liability when Joe Q. Public's acts of infringement cross OSP wires.
 - Example: copyright infringement occurs upon reproduction of another's work so when I send a photo I find on the internet to a friend via email the email host is technically reproducing that email...or in Instagram's case when I post another's photo Instagram is technically reproducing and publicly displaying it → those actions of reproduction and public performance of a work trip copyright infringement wires.
- 1998 congress acts and enacts the DMCA to protect OSP's from scope of copyright

DMCA purpose and intent

- “In the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability...service providers must make ... electronic copies ... in order to host World Wide Web sites.” S. Rep. No. 105-190, at 8-9
- “service providers and copyright owners to cooperate to detect and deal with copyright infringement...” *ID.* at 20.
- But “those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property of others should know that there is a realistic threat of losing that access.” H.R. Rep. No. 105-551(II), at 61 .
- “It will also encourage the continued growth of the existing off-line global marketplace for copyrighted works in digital format by setting strong international copyright standards.” S. Rep. 105-190 at 8

DMCA statutory scheme: the balance sought by the statute

GENERAL RULE: an OSP is not liable “for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system...” 17 U.S.C. § 512(c), where the OSP:

- (1) “adopted and reasonably implemented ... a policy that provides for the termination in appropriate circumstances of repeat infringers,” 17 U.S.C. § 512(i);
- (2) does not “receive[] a financial benefit directly attributable to the infringing activity” where the OSP “has the right and ability to control such activity,” *id.* § 512(c)(1)(B);
- (3) “(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material,” § 512(c)(1)(A)(i)-(iii).

Net result from DMCA for OSP's and copyright holders

- If OSP has content published on its site that was genuinely user uploaded, then OSP has no copyright liability if it lacks actual/apparent knowledge (or if has such knowledge removes material when it gains the knowledge) and lacks a financial benefit and has adopted a policy for terminating repeat infringers.
- This means copyright owners, if those factors are met and they want their copyrighted content removed, then they must send a takedown notice to the OSP to get the material removed.

Takedown process

- OSP needs easy to find and understand take down process on its website
- Clear, plain English standard for who can submit take down request and how to do so
- Allow means to submit one take down notice that may have multiple URL's identified with infringing content
- Accept by email or web form submission from rightsholder
- Upon receipt, should disable access to the URL within 24-48 hours to be safe
- Counter-designation process: the poster has a chance to counter-designate and claim a right to post by explanation; then rightsholder can respond or file suit to maintain disabled access

YouTube : monetizing others' content, who if anyone pays?

- *Viacom & Football Ass'n v. YouTube*, 676 F.3d 19 (2d. Cir. 2012), Facts: English FA soccer league and Viacom as copyright content owners sued for the presence of myriad clips of their content.
- Held: (1) Viacom had argued that YouTube lost safe harbor protection because it had a general awareness of infringement and, therefore, had the obligation to take “commercially reasonable steps” to police it. Rejected. (2) Viacom argued there was so much content that YouTube was willfully blind and so had apparent knowledge. Rejected, no duty to monitor. (3) right and ability to control requires item-specific knowledge.
- BUT: YouTube also took user uploaded content and syndicated it. As to that, the 2d Cir. Held that that was a separate act of YouTube, a volitional one and was not simply user uploaded content sitting on YouTube's servers.

Similar Rule in Ninth Circuit for YouTube-like sites

- *UMG v. Shelter Capital*, 718 F.3d 1006 (9th Cir. 2013) → Facts: Veoh is a web site service that let's ppl upload their videos and share them with others. Users must register to upload and publish video content. One uploaded Veoh's automated software converts video to proper format for publication and extracts user embedded metadata for searches. Hash technology to block content flagged by rightsholders.
- Held: not liable for copyright infringement of music videos of pltf that were user uploaded.
- Critical: knowledge of infringing activity in general is not broad or general, must be focused to particular videos at issue. (1021-22). At same time, service provider cannot bury its head in sand to avoid knowledge. (1023). Facts must be those that make specific infringement of a given work obvious to any reasonable person.

Post-YouTube case law in online areas of OSP's monetizing celebrity photos and porn content

- *Mavrix v. LiveJournal*, 853 F.3d 1020 (9th Cir. 2017)– celebrity photos and online liability
- Facts: defendant's ontd website is a site devoted to celebrity culture. Site rules asked for current, celebrity content. The photos at issue were submitted by users of the website but were reviewed and approved by the website moderators before they were publicly posted on the site.
- Holding: (1) whether users uploaded the content or moderators, since they screened and approved it for publication per site rules, made it a fact question as to who was even uploading, the threshold issue for immunity.
- **Key Difference to *YouTube*: YouTube is a neutral anything and everything site, not a specific curated website that only accepts certain content which is reviewed per site rules and then published. The more a modern OSP business wants to control and curate the content posted by online users by a review and adopt policy, the more likely the safe harbor is to be potentially lost.**

Where celebrity photo owners prevailed...pornography owners failed...

- *Ventura v. Motherless*, 885 F.3d 597 (9th Cir. 2018) – pornography and online liability
- Facts: user uploaded hundreds of thousands of videos; many takedown notices to the user; not terminated; infringed pltf's content; pre-publication company viewed snapshots of all videos to approve posting; some of pltf's had watermarks. No written termination policy.
- Holding: no obligation to terminate user account that infringed.
- Dissent: this has immunized all OSP'S essentially. "What [defendant] is really saying is that he looks at each thumbnail for a fraction of a second to identify repeat infringers. [DEFENDANT] uses his "judgment" rather than a policy to make this determination."

SCOTUS wades in? The *Twitter* case

- Relatives of people killed in ISIS terrorist attacks sued Twitter for allegedly hosting and recommending content posted by ISIS and its supporters. Argument was the content radicalized others, created propaganda, and encouraged other terrorists to attack.
- But the content was handled at “arm’s length, passive, and largely indifferent” and Twitter was “agnostic as to the nature of the content.”
- Twitter used algorithms that were content-neutral. This was the equivalent of standing back and watching as an observer – not direct or intentional enough to constitute aiding and abetting.
- Reaffirms deep 230 immunity principle.
- *Twitter v. Taamneh*, 21-1496 (May 2023)

Conclusions

- Online tort and copyright immunities for OSP businesses are very broad
 - Near absolute for state tort liability for user postings.
 - DMCA has allowed near complete immunity for OSP's for others' infringing acts on their services, but has also required OSP to act and remove content upon notice and terminate repeat infringers.
- Amendments to immunities on have been discussed for years but nothing has happened.
- SCOTUS reaffirmed 230's strength in 2023.